LAM KONG COMPANY (PTE) LTD

v.

THONG GUAN CO (PTE) LTD

COURT OF APPEAL, KUALA LUMPUR
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
LOW HOP BING J
[CIVIL APPEAL NO: J-02-774-2000]
20 APRIL 2004

CONTRACT: *Formation - Concluded contract - Sale and purchase of land - Agreement executed under seal - Whether valid and binding - Whether could be challenged on mere technicality - Estoppel - Applicability of maxim*

The plaintiff and the defendant, which were registered in Singapore, had entered into a sale and purchase agreement ('SPA') respecting the sale of several parcels of land in Johore Bahru ('the property'). The SPA *inter alia* provided that the defendant, at the time of executing the agreement, had received from the plaintiff the purchase consideration of S$52,000 thereof. Subsequently, the defendant denied executing the SPA or receiving the said purchase price, and in the circumstances refused to execute the transfer of the property to the plaintiff. The plaintiff was granted new issue documents of title by the Registrar of Land Titles, and thereafter applied for and obtained a declaration: (i) that the new issue documents of title were valid; and (ii) that it be endorsed as the registered proprietor of the property. The defendant appealed and argued that the SPA was *ultra vires* the defendant's Memorandum and Articles of Association ('M&A') and was therefore invalid and null and void. Further, it was argued that the SPA was incapable of being executed as the defendant, at the material time, had only one director.

Held (dismissing the appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] Article 80 of the defendant's M&A provides that an instrument that is sealed with the common seal and signed by both a director and a secretary of the company (as is the case here) shall be conclusive of the fact that the seal had been properly affixed. (p 836 f)

[2] It would be unconscionable to allow the defendant to challenge the validity of the contract on a mere technicality, more so when it had already acknowledged having received the full purchase price thereof. Moreover, the law as it then was in July 1967 allowed private companies to have only one director (s. 142(2) of the Singapore Companies Ordinance). Hence it was lawful for the defendant as a private company to have a single director in July 1967. (pp 837 h & 838 a-b)

[3] There was absolutely no merit whatsoever in this appeal. The learned judge was right in ruling that the doctrine of estoppel was applicable against the defendant. The defendant was estopped from denying the course of conduct whereby it had, *vide* letter dated 12 March 1970 and other such letters to the plaintiff, admitted to the contract. There was no doubt that the defences such as non-execution of the SPA and failure of consideration were not *bona fide*. The learned trial judge was right in describing the defences as "nothing but mere shams". (pp 839 f-g & 840 c & g)

[4] The contract was valid, lawful and binding and in furtherance of the object and prime business of the defendant. There was therefore ground to apply the old maxim of *verba ita sunt intelligenda ut res magis valeat quam pereat* to give effect to the intentions of the defendant and the plaintiff. (p 840 f)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif dan defendan, yang masing-masing didaftar di Singapura, telah memeterai satu perjanjian jual beli ('SPA') berkaitan penjualan beberapa hartanah di Johor Bahru ('hartanah'). SPA antara lain memperuntukkan bahawa defendan, sewaktu menandatangani perjanjian, telah menerima dari plaintif harga jualan hartanah sebanyak S$52,000. Bagaimanapun, defendan kemudian menafikan pemeteraian perjanjian ataupun penerimaan harga jualan, dan atas alasan itu enggan melaksanakan pindahmilik hartanah kepada plaintif. Plaintif telah diberikan geran hakmilik baru hartanah oleh Pendaftar Hakmilik Tanah, dan berikutnya memohon dan memperoleh perisytiharan: (i) bahawa geran hakmilik baru tersebut adalah sah; dan (ii) bahawa mereka hendaklah diendorskan sebagai pemilik berdaftar hartanah. Defendan merayu dan berhujah bahawa SPA adalah *ultra vires* Memorandum dan Artikel Persatuannya ('M & A') dan kerana itu adalah batal dan tak sah. Juga dihujahkan bahawa SPA tidak boleh dimeterai oleh kerana defendan, pada waktu material, mempunyai hanya seorang pengarah.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Fasal 80 M & A defendan memperuntukkan bahawa sesuatu instrumen yang dimeterai dengan tanda mohor dan ditandatangani oleh kedua-kedua pengarah dan setiausaha syarikat (sepertimana halnya di sini) adalah menjadi bukti bahawa cap mohor tersebut telah dilaksanakan dengan sewajarnya.

[2] Adalah tidak munasabah untuk membenarkan defendan mencabar keesahan kontrak hanya dengan berasaskan sesuatu yang teknikal, lebih-lebih lagi apabila terdapat pengakuan bahawa ia telahpun menerima sepenuhnya harga jualan. Selain itu, undang-undang sepertimana ianya wujud pada Julai 1967 membenarkan syarikat-syarikat untuk hanya mempunyai seorang pengarah (s. 142(2) Ordinan Syarikat Singapura). Oleh itu adalah sah bagi defendan sebagai sebuah syarikat sendirian untuk hanya mempunyai seorang pengarah.

[3] Rayuan di sini langsung tidak bermerit. Yang arif hakim adalah betul dalam memutuskan bahawa doktrin estoppel terpakai kepada defendan. Defendan telah diestop dari menafikan siri kelakuannya di mana, melalui surat bertarikh 12 Mac 1970 dan surat-surat lain yang sepertinya, ia telah memperakui akan kewujudan kontrak. Tidak ada sebarang keraguan bahawa pembelaan-pembelaan seperti ketidwujudan SPA dan kegagalan pembalasan adalah sebenarnya tidak *bona fide*. Yang arif hakim adalah betul apabila menggambarkan pembelaan-pembelaan tersebut sebagai "tidak lebih dari suatu helah".

[4] Kontrak adalah sah dan mengikat dan dimeterai mengikut tujuan dan perniagaan utama defendan. Dengan itu, adalah wajar untuk menggunapakai maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* bagi memberi kesan kepada kehendak-kehendak defendan dan plaintif.

Rayuan ditolak.]

Case(s) referred to:
Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
In re Hampshire Land Company [1896] 2 Ch D 743 ***(refd)***
Northside Developments Pty Ltd v. Registrar-General [1990] 64 ALJR 427 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Re David Payne & Co [1904-7] All ER Rep 1501 ***(refd)***
Thong Guan Company (Pte) Ltd v. Lam Kong Company Ltd (No 2) [1998] 3 CLJ 964 HC ***(refd)***

Legislation referred to:
Companies Ordinance [Sing], s. 142(2)

Other source(s) referred to:
Halsbury's Laws of England, 1975, 4th edn, vol 12, p 544, para 1365
Phillip Lipton & Abraham Herzberg, *Understanding Company Law*, 7th edn, p 332

For the appellant - Cyrus Das (Shamsul Bahrin Manaf & Sunita S Sothi); M/s Shook Lin & Bok
For the respondent - M Pathamanathan (Gan Techiong); M/s Gan & Lim

Reported by WA Sharif

JUDGMENT

Nik Hashim JCA:

Background

This appeal is directed against the decision of Abdul Malik Ishak J reported in [1998] 3 CLJ 964 in an action brought by the respondent before us as plaintiff against the appellant as defendant. At the conclusion of submissions of learned counsel from both sides on 2 April 2004, we dismissed the appeal with costs. The reasons for our decision now follow.

Both the plaintiff and the defendant were bodies corporate registered in the Republic of Singapore. The plaintiff purchased 26 parcels of land in the Mukim of Tebrau in the district of Johor Bahru from the defendant under an agreement dated 28 July 1967 (the SPA) (exh. P1) for a consideration of S$52,000. By cl. 2 of the SPA the consideration was acknowledged by the defendant in the following terms:

> 2. The purchaser (the plaintiff) has already paid to the vendor (the defendant) the total purchase price of $52,000.00 before the signing of this agreement the receipt of which the vendor (the defendant) hereby acknowledges.

The plaintiff claimed that the defendant had failed to apply to the Collector of Land Revenue for the issue documents of title to each of the 26 parcels of land and to execute the transfer documents in favour of the plaintiff or its nominees. The plaintiff obtained a judgment in default of appearance against the defendant which on appeal by the defendant, was set aside by the then Supreme Court. But, prior to this setting aside, the High Court of Johor Bahru had ordered the Registrar of Land Titles to issue the documents of title in favour of the plaintiff. As such, the plaintiff had possession of the new issue documents of title (the old ones having been cancelled by the Collector of Land Revenue) which showed that the plaintiff remained as the proprietor of the land. During the trial, the plaintiff amended its statement of claim seeking, *inter alia*,

a declaration that the new issue documents of title were valid, and an order directing the Registrar of Titles to endorse the plaintiff as the registered proprietor on the register document of title. In its amended statement of defence the defendant denied entering into the SPA and receiving the purchase consideration of S$52,000. Alternatively, the defendant contended that the SPA was *ultra vires* the defendant's memorandum and articles of association (the M&A) and was therefore void. The learned judge allowed the plaintiff's claim and hence, this appeal.

Appeal

It is the defendant's case before us that the contract is invalid and was signed without authority under the company's M&A by a director purporting to be the managing director and a company secretary who was not authorized to sign any contract. The defendant also raised the issues of non receipt of the purchase price and that the principles of non est factum and estoppel have no application to the case.

Contract Under Seal

The SPA was executed specifically under seal. The fact that the contract was under seal was not even disputed in the High Court. It is elementary that when a contract is made under seal by a corporation, the act of affixing the seal is equivalent to the company's signature (see *Understanding Company Law* (7th edn.) Phillip Lipton and Abraham Herzberg at p. 332; *Northside Developments Pty Ltd v. Registrar-General* [1990] 64 ALJR 427 at p. 432). Though in this case it was not necessary for the SPA to be made under seal, the learned trial judge made a specific finding of fact that the SPA was signed and sealed. Article 80 of the defendant's own's M&A expressly provides that "in favour of any purchaser", an instrument that is sealed with the common seal and signed by both a director and secretary of the company (as is the case here) shall be conclusive of the fact that the seal had been properly affixed. Besides, the learned judge found for a fact that the defendant's seal was properly affixed to the SPA when in his judgment at p. 59 of the appeal record, he said:

> The seal of the defendant was affixed to the sale and purchase agreement as reflected in exhibit P1 and in my judgment both Thong Kong Fye and Koh Kok Peng had rightly put their signatures thereto which must in law bind the defendant and be conclusive of the fact that the seal was properly affixed. This was my judgment and I so hold accordingly.

Further, Mr. Hsieh Shao-An (SPI), the solicitor who witnessed the signing of the SPA, testified that Thong Kong Fye, the managing director of the defendant, signed the SPA together with its secretary, Koh Kok Peng in his presence on 28 July 1967. The purchaser was Thong Guan Co and the signatory was that of Tan Poh Cher and Chew Chee Seng. Thus, the defendant's submission that

"the contract was purportedly signed by Thong as director and Koh as secretary when neither was authorized by resolution or under the M&A to do so" is hollow and without merit.

Article 71

The defendant sought to rely on the Form 31 at p. 649 of the appeal record submitted to the Registry of Companies and Businesses of Singapore (the ROC) to say that three of the four directors of the defendant company resigned on 27 July 1967 making it a one director company (ie, Thong) at the time of signing of the contract thereby rendering it invalid for being in breach of art. 71 of the M&A which states:

> The continuing Directors may act notwithstanding any vacancy in their body; provided always that in case the Directors shall at any time be reduced in number to less than two it shall be lawful for the remaining Director to act as Directors for the purpose of filling up vacancies in the Board, but not for any other purpose.

It must however be noted that this Form 31 was only submitted on 21 August 1967. Hence it does not affect the position of any third party making a search at the Registry on 28 July 1967. In the present case the contract was concluded before 28 July 1967 and the parties merely formalized it on 28 July 1967. On 28 July 1967 the managing director (Thong) and secretary (Koh) were merely carrying out what was already authorized.

In the instant case the defendant company had at least two directors as Kwek Kok Thye only resigned on 10 August 1967. It was admitted in evidence at the trial that the original signed carbon copy of a resignation letter dated 10 August 1967 was signed by the late Kwek Kok Thye (exh. P24 at p. 678 of the record of appeal) and based on P24, the learned judge made a finding of fact (at p. 69 of the appeal record) that Kwek Kok Thye resigned on 10 August 1967 which date coincided with the appointment of two new directors as reflected in the Form 31. Though the Form 31 filed on behalf of the defendant with the ROC showed an earlier resignation date, it is a fact that the said Form dated 21 August 1967 was filed after 21 August 1967. In the absence of any direct evidence, and there was none in this case, to contradict the said resignation letter dated 10 August 1967, all that could be safely ascertained was that Kwek's resignation took place prior to the date of the Form 31 ie, 21 August 1967. It would be most unfair and unconscionable to allow the defendant to use a technicality of this sort to challenge the validity of a contract for which it already acknowledged having received full purchase price of S$52,000.

Law In July 1967

Moreover, the law as it then was ie, July 1967, allowed private companies to have only one director. Section 142(2) of the Singapore Companies Ordinance (Cap. 174) exempted private companies from having at least two directors ie, a private company could have only one director. Hence, it was lawful for the defendant as a private company to have a single director in July 1967. Any suggestion to the contrary would surely conflict with the prevailing law then and therefore cannot prevail.

Knowledge

On the issue that the plaintiff had actual knowledge if not put on inquiry by the alleged sudden resignation of three directors on the eve of the contract, it is important to note that the plaintiff's directors who executed the contract on 28 July 1967 were not the ones who allegedly resigned as directors of the defendant company. Thus, knowledge of any resignation cannot be imputed. Surely, the resigning directors would have given notice (if any) to the secretary of the defendant company and not to the plaintiff. The knowledge of an officer common to two companies is not necessarily the knowledge of both companies and will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice (see *In re Hampshire Land Company* [1896] 2 Ch. D 743; *Re David Payne & Co* [1904-7] All ER Rep. 1501).

Non Receipt Of Purchase Price

The defendant's argument that it did not receive the purchase price on the ground that there was no receipt to support it is ludicrous and against the entire weight of evidence. The defendant had admitted in cl. 2 of the contract (P1) to receiving the full purchase price of S$52,000 even before the signing of the contract, and the payment was further confirmed by the sworn testimony of the defendant's own solicitor, SP1. The defendant adduced no evidence whatsoever to even challenge the acknowledgement of the payment. We agree with the learned counsel for the plaintiff that since the contract acknowledged the payment, the contract therefore is the receipt that the defendant had already been paid.

Non Est Factum

The defendant in its amended statement of defence pleaded:

> 1. Paragraphs 1 and 2 of the statement of claim are denied. The defendants deny entering into the agreement dated 28 July 1967 for the sale of 26 lots of land. The defendants aver that there was and still are no such sale. Accordingly the defendants deny receiving the sum of $52,000.00 or any sum at all for the alleged sale.

2. **Alternatively,** defendants contend and will contend that even if the alleged agreement does exist (which is denied):

2.1 The alleged agreement and purported transaction is *ultra vires* the M&A of the defendant company and is therefore void. (emphasis added)

It is worthy of note that the aforesaid plea of capacity of the signatories being *ultra vires* the M&A is an alternative plea to para. 1 of the defendant's defence. Obviously, the denial of the very existence of the SPA is a plea of *non est factum* in its essence and true form. According to *Black's Law Dictionary*, 5th edn 1979, "*Non est factum"* means "a plea denying execution of instrument sued on". *Halsbury's Laws of England*, 4 edn vol. 12, 1975 at p. 544 para. 1365 states:

(ii) Plea of *Non Est Factum*

1365. **When plea available**. The plea of *non est factum*, or nient son fait, is that by which a man sought to be charged in some action or proceeding upon a writing alleged to have been sealed and delivered by him avers that it is not his deed. This plea is only available where the party sued can show either that there never has been, or that there is not existing at the time of the plea, any valid execution of the deed on his part ...

Thus, by its own pleadings, the defendant did clearly plead *non est factum*. It is therefore not true to say that the plaintiff and the learned trial judge went on a frolic of their own by raising issues for the defendant which the defendant did raise in its pleadings.

Estoppel

On the question of estoppel, we agree with the learned trial judge that the doctrine of estoppel is applicable against the defendant (see *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283). The defendant is estopped from denying the course of conduct whereby the defendant in its letter dated 12 March 1970 to the plaintiff admitted the contract ie, the sale and purchase agreement (SPA) to purchase the 26 lots as stated in the letter:

In fact the new management took over the company (the defendant) with the full knowledge that the 26 lots have been sold to you (the plaintiff) and the remaining lots are owned by the company (the defendant).

Besides this letter, the plaintiff was also in possession of the defendant's other letters. One of such letters was dated 2 April 1970 which reads:

> We regret to inform you that the mortgage of your abovementioned properties to Asia Commercial Banking Corporation Limited was made by the former director of the company, Mr. Thong Kong Fye. Since the company has been taken over by the new management, we will no doubt be liable for such act undertaken by Mr. Thong Kong Fye.
>
> Therefore, we will take steps to redeem your abovementioned properties and thereafter to comply with clause 6 of the said Agreement for sale (SPA) ...

A perusal of these letters will leave no room for any doubt that the defences such as the non-execution of the SPA and the failure of consideration are not *bona fide*, and in this regard, the learned trial judge was right when his Lordship aptly described the defences as "nothing but mere shams" (p. 75 record of appeal).

Conclusion

In summary therefore, having reviewed this case as a whole and having considered the submissions of both sides, we were not prepared to disagree with the learned trial judge on his findings of facts based on the evidence adduced before him, and consequently, we found no good reasons for interfering with his judgment. In our judgment, the contract was valid, lawful and binding and in furtherance of the object and prime business of the defendant. Trafficking in land was the mainstay and core business of the defendant (see para. 3(2) of the M&A at p. 592 of the appeal record and also evidenced in the contract itself). It is an established principle that courts strive to uphold rather than destroy bargains which the parties believe to have concluded. The old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat* (see *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635) is applicable in this case. We accordingly applied this maxim to give effect to the intentions of the defendant and the plaintiff rather than holding that there was no valid contract between them.

Finally, we hold that there was absolutely no merit whatsoever in this appeal and dismissed it with costs and further ordered that the deposit be paid to the plaintiff towards accounts of taxed costs. The order of the learned judge was affirmed except the prayer pertaining to damages under item (vi) of the plaintiff's statement of claim which was struck out following its withdrawal by the plaintiff in the appeal. We also made a consequential order that the defendant was to deliver to the plaintiff a registrable Form 14A of the National Land Code 1965 for each parcel of land on or before 16 April 2004.